In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-813

ARMANDO CAPONIGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 465 F. 2d 374.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1972. A petition for rehearing was denied on October 4, 1972. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to December 3, 1972, and on Monday, December 4, 1972, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

494-014—73——1

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for violating the Hobbs Act.

2. Whether the trial court erred in admitting testimony of petitioner made at a union disciplinary hearing.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of having obstructed and affected interstate commerce by means of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to concurrent ten-year terms of imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

1. The evidence at trial showed that on or about April 1, 1969, William Harrington became general superintendent for C. A. Gibeaut, Inc., the sub-contractor at a building construction site in Hallendale, Florida (Tr. 58).[1] Harrington arrived during a carpenters' strike which lasted until April 10, 1969 (Tr. 110–111, 148). When the strike ended, petitioner, the head steward for the carpenter's union, approached Harrington, noted that there were no union problems, and asked for a "kickback" or "bonus." Harrington said he could not give petitioner any kickback and that petitioner would have to see Harrington's boss,

[1] "Tr." refers to the trial transcript which is on file with the Clerk of this Court.

William Orton, the vice-president of the sub-contractor (Tr. 113, 172).[2] Several times after this conversation petitioner approached Harrington and asked about his "kickback." When the first payroll check after the strike was issued, petitioner inquired why there was not "anything" in his pay check from Harrington. The following week petitioner approached Harrington three or four more times with similar requests; Harrington told him to see Orton (Tr. 113–114). Not long thereafter petitioner again spoke with Harrington and stated: "You know, I can make it awfully rough for you if you don't come across." Harrington acknowledged petitioner's remark and said that Orton was the one to see (Tr. 115).

After this conversation, Harrington spoke with Orton in May or June 1969, and they both met later with Joe Fante, the vice-president of the contractor, Burk Builders, at his trailer on the construction site. At the conclusion of this meeting Harrington and Orton met again, and Orton instructed Harrington to put petitioner on the subcontractor's payroll for one day's pay per week (Tr. 93–95, 115–117, 191–193). Petitioner, although an employee of the contractor, was never asked to do any work for the sub-contractor, and performed no work for his one day's pay per week (Tr. 99, 117–118, 120–121).

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[2] Orton testified that in February or March 1969, petitioner came to him and wanted to borrow $500 from the sub-contractor to buy a truck. Orton conferred with his boss and reported that the company would not lend that much money (Tr. 63–69).

Harrington and Orton testified they had paid petitioner in order to prevent any union trouble or delays on the job (Tr. 194, 304). Harrington also testified that he was aware of the capability of stewards to cause trouble and that firing a steward for cause was a time-consuming process (Tr. 203).

Pursuant to the agreement to pay the petitioner a sum equivalent to one day's work per week, the subcontractor issued a weekly check for the period commencing on July 23, 1969 [3] and ending on August 20, 1969 (Government's Exhibits 6–10). When Harrington returned from a two and one-half week vacation which he took at the end of July, he discovered that petitioner was being paid by both the contractor and the sub-contractor on a forty-hour per week basis. Harrington spoke with the timekeeper and then with Orton, and fired the timekeeper. He also stopped payment on petitioner's last check (Tr. 118–119, 191).

On the following Monday, petitioner asked Harrington where his bonus was. Harrington explained that petitioner had received his bonus while Harrington was away and that no more money would be forthcoming. Petitioner then repeated his earlier threat that "I can make it awfully rough on you if you don't come across" (Tr. 121). For several weeks thereafter there were labor problems at the construction site.

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[3] Sometime in July, 1969, prior to the issuance of the first check, petitioner approached Orton and asked Orton to take care of him; around the same time petitioner also went to Harrington, explained that he had purchased a new truck, and expressed a need for some money (Tr. 102–103, 136).

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2. Prior to Christmas 1969, petitioner approached Orton and asked where his Christmas bonus was. Orton explained that as far as he was concerned petitioner had already received his bonus (Tr. 105–106). During this same time period petitioner also twice approached Harrington and inquired about his bonus, repeating on one occasion his threat "to make it awfully rough on you if you don't come across." Each time Harrington reiterated that the bonus had been paid while he was on vacation and that petitioner was not getting any more (Tr. 129–130).

On December 26, 1969, Harrington was informed of a work stoppage on the bay side of the project; when he arrived petitioner was there and told Harrington to come with him. Thinking that a business agent wanted to see him, Harrington went with petitioner into the basement of one of the buildings on the site (Tr. 130–131). Once they were inside, petitioner positioned himself between Harrington and the entrance, placed a pistol against Harrington's chest and threw him against the wall saying: "I'll blow your damn heart out" or words to that effect. Harrington asked petitioner if he was crazy, to which petitioner responded: "You didn't give me any bonus. You're going to get yours now." Harrington pushed petitioner's hand down, ran out of the building and called the police (Tr. 131–132).

ARGUMENT

1. a. Petitioner contends that the evidence was insufficient to support his conviction for extortion since the trial testimony allegedly showed that the monies

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were paid voluntarily and not as a result of fear or threats.[4] The Hobbs Act (18 U.S.C. 1951(b)(2)) defines extortion as: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear * * *." Such fear includes fear of economic harm. See *United States* v. *Addonizio,* 451 F. 2d 49 (C.A. 3), certiorari denied, 405 U.S. 936; *United States* v. *Tropiano,* 418 F. 2d 1069, 1083 (C.A. 2), certiorari denied, 397 U.S. 1021. A direct threat is not necessary to constitute the crime of extortion under the Hobbs Act. All that is necessary is that the accused induced his victim to part with his property through the use of fear, *United States* v. *Tolub,* 309 F. 2d 286, 289 (C.A. 2), and that the victim's fear is reasonable. *Carbo* v. *United States,* 314 F. 2d 718, 740 (C.A. 9), certiorari denied, 377 U.S. 953. Veiled threats are as much proscribed by the Hobbs Act as express ones. *United States* v. *Dale,* 223 F. 2d 181 (C.A. 7).

Here, the evidence showed that the sub-contractor's representatives, Orton and Harrington, agreed to place petitioner on their payroll solely for the purpose of avoiding the labor troubles petitioner threatened. With respect to the second count of the indictment, which referred to the threat petitioner made to Har-

[4] Petitioner makes no attempt to argue that his status as a union official gives him any immunity from the provisions of the Hobbs Act, but simply challenges the sufficiency of the evidence that he derived personal pecuniary benefits by extortion. Thus, there is no need to defer action on this petition pending a decision in *United States* v. *Enmons,* No. 71-1193, argued December 4, 1972.

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rington after Christmas, 1969, the evidence showed that there was no voluntary offer of money by Harrington but rather an attempt by petitioner to extort money from the sub-contractor by threatening to shoot him.

b. Petitioner also contends that there was no showing that his extortion affected interstate commerce.

As this Court said in *Stirone* v. *United States,* 361 U.S. 212, 215, the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.' " Thus only a minimal impact on commerce is required to sustain a conviction under the Act. *United States* v. *Hyde,* 448 F. 2d 815, 836–837 (C.A. 5), certiorari denied, 404 U.S. 1058; *United States* v. *Tropiano, supra.* See *Katzenbach* v. *McClung,* 379 U.S. 294; *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241. A sufficient nexus with interstate commerce was shown here by the depletion of the business's resources due to extortionate payments (see *United States* v. *Amabile,* 395 F. 2d 47, 49 (C.A. 7), vacated and remanded on other grounds *sub nom. Giordano* v. *United States,* 394 U.S. 310; *United States* v. *Provenzano,* 334 F. 2d 678, 692 (C.A. 3), certiorari denied, 379 U.S. 947), coupled with the fact that the extorted business purchased and sold products that travelled in interstate commerce.

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See *Addonizio, supra; United States* v. *DeMasi*, 445 F. 2d 251, 257 (C.A. 2), certiorari denied, 404 U.S. 882.[5]

2. In February 1971, a committee from the national headquarters of the United Brotherhood of Carpenters and Joiners of America held hearings in Miami regarding the operation of the local union.[6] When the government sought to introduce the transcript of these hearings defense counsel initially objected on several grounds. After a hearing out of the jury's presence, the court indicated that it would permit introduction of the transcript but would withhold its ruling overnight to permit petitioner's counsel to research the questions of law involved (Tr. 272–273, 276). When court reconvened, petitioner's counsel indicated that after researching the questions nothing had been found to "contradict or basically contradict the Government's position," and stated that the defense "waive[d] any objection to that portion of the transcript" the government sought to introduce, and, alternatively, moved for the admission of the entire

[5] For example, in the course of performing its work at this site C. A. Gibeaut, Inc., the sub-contractor, ordered plywood and four by fours from Kirkpatrick Lumber Company, Cincinnati, Ohio (Tr. 25–26, 28–31, 59–60). The sub-contractor placed orders with Kirkpatrick from September 1968 until December 1969 and the goods ordered from Kirkpatrick were usually shipped from Oregon and Washington to the sub-contractor in Florida (Tr. 31). These were the materials on which the carpenters worked.

[6] Present at these hearings was Miss Rosalyn Burstein, a stenographer, who took notes that were later transcribed and who testified at trial that the transcript was a true and accurate carbon copy of the testimony she heard (Tr. 223–225, 235–237).

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transcript into evidence (Tr. 286, 289). After the transcript was admitted into evidence, partly as a government exhibit and partly as a defense exhibit, a portion of the transcript was read to the jury in which petitioner examined five checks and stated that it was his endorsement on the back of the checks (Tr. 297, 299).

Petitioner contends that the introduction of the testimony from the union hearings violated his Fifth and Sixth Amendment rights. It is evident, however, that petitioner waived any objections to the exhibits. See *Johnson* v. *United States*, 318 U.S. 189, 199–201; *Hyler* v. *United States*, 402 F. 2d 558, 561 (C.A. 5), certiorari denied, 394 U.S. 908.[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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[7] In any event there is no basis for petitioner's objection that the introduction of his testimony at the union meeting violated his privilege against self-incrimination. His situation is no different from that of a private employee being questioned by his employer with respect to his job and under the threat of loss of employment if he refuses to answer. No governmental compulsion was involved here. Reliance on *Garrity v. New Jersey*, 385 U.S. 493, and *Spevack v. Klein*, 385 U.S. 511, is misplaced. In both cases the questioning was by a governmental agency and the Fifth Amendment became relevant because it protects against the government's compelling a person to incriminate himself.

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